IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 426 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JERAM TABHA KOLI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 426 of 1999

MR BS SUPEHIA for Appellant (THROUGH JAIL)

MR IM PANDYA APP for Respondent State

CORAM : HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 03/09/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE R.P.DHOLAKIA)

Heard Mr.BS Supehia, learned counsel for the appellant - accused and Mr.IM Pandya, learned APP for respondent - State.

2. Mr.Supehia, learned counsel for the appellant has restricted his arguments only on the point of quantum of punishment in view of the evidence on record, more particularly, evidence of victim PW No.2 Ex.7. He took us to the Chief Examination as well as Cross-examination of the victim, wherein she has categorically deposed before the court below and argued that it is in fact, a case of love affair, there was sexual relation between the appellant and the prosecutrix well before the incident in question, the prosecutrix was the consenting party in the incident in question and same has been established beyond reasonable doubt; even the prosecutrix had voluntarily gone with the appellant to Adipur and they stayed in Adipur and Gandhidham as a husband and wife for a period of eight months. He has further argued that the prosecution has tried to establish that the prosecutrix was of 16 years, but in fact, she was major at the time of incident. Consequently, he has prayed that considering the totality of the case and evidence of the prosecutrix herself, the sentence awarded by the lower court i.e. Rigorous Imprisonment for 10 years for the offences punishable under secs. 363, 366 and 376 of Indian Penal Code, is on higher side and the appellant is in judicial custody since 3/5/1998 i.e. since last 6 years and therefore, the same may be reduced appropriately.

3. On the other hand, learned APP after going through the evidence of prosecutrix, has also not disputed the facts stated by the prosecutrix in her chief examination. However, he has argued that it is true that it is a case of love affair, but as established by the prosecution, the prosecutrix was below 16 and therefore, though there is consent of the prosecutrix, in view of the provisions of sec.375(6), her consent is not consent in the eye of law and hence her such consent cannot rescue the appellant. At the end of arguments, he has prayed to pass appropriate order in the facts and circumstances of the case.

4. We have gone through the evidence on record, more particularly evidence of the victim. From her chief-examination, it is clearly established that the appellant and the prosecutrix were neighbours, they were working together and were knowing each other. It is also established that they were in deep love and there was sexual relation between them since long i.e., prior to the incident. She has fairly deposed in her chief examination that on the day of incident also she had gone along with the accused on her own and they had gone to Adipur, Gandhidham where they resided together as husband

and wife for a period of eight months, but as the father of the prosecutrix filed the complaint, the appellant accused has been arrested. The cross examination of the prosecutrix also supports the case of the appellant, wherein she has admitted that she had voluntarily ran away with the appellant accused and they had resided as husband and wife in Adiput, Gandhidham for a period of eight months.

5. So far as the age of the prosecutrix is concerned, the prosecution has tried to prove the same on the basis of the Birth Certificate of the prosecutrix issued by Halvad Nagarpalika Ex.16, according to which, the birth date is 20/1/1982, whereas the incident in question has happened on 4/6/1997 and therefore, according to the said Birth Certificate Ex.16, the age of the prosecutrix was about 14 years and 5 months. The father of the prosecutrix complainant has deposed that the prosecutrix was aged 15 years and 5 months, whereas the prosecutrix has deposed that she was aged about 16 years, at the time of incident. However, the medical evidence is otherwise. The Medical Certificate issued by the Referal Hospital, Surendranagar Ex.29 as well as the case papers of Case No.28 of the prosecutrix show that the petitioner was aged about 17 years at the time of incident. Further, as per the deposition of Dr.Varma, who has examined the prosecutrix has clearly stated that the prosecutrix was aged about 17 years; there was no marks of nail injury, or recent rape ("Sambhog"); and the prosecutrix has informed him that earlier there was sexual relationship. Furthermore, Mr.Ashokbhai Dave, Clerk of Halvad Nagarpalika in his deposition Ex.14 has clearly stated that the birth date of the prosecutrix was entered into the register maintained for registration of Birth and Death, as per the information provided by one Jasuben. However, the prosecution has not established as to how the said Jasuben is related to the prosecutrix or the complainant, father of the prosecutrix. The trial court relying on the birth certificate issued by the Halvad Nagarpalika, has come to the conclusion that on the date of incident, the prosecutrix was below 16 years and hence has convicted the appellant. But the fact remains that the prosecutrix has attained the age of discretion i.e. the verge of maturity, which is clear from the evidence on record, more particularly of prosecutrix herself. Considering the facts and circumstances of the case, more particularly the fact that it is case of love affair, there were sexual relation between the appellant and the prosecutrix, the prosecutrix voluntarily ran away with the appellant and resided in Adipur, Gandhidham for a period of eight

months and also bearing in mind the evidence of prosecutrix, totality of the evidence and medical evidence regarding age of the prosecutrix, we are of the opinion that the prosecutrix was at the age of discretion on the date of commission of the alleged offence and therefore, it is a fit case to exercise our discretion by reducing the sentence. The trial court has awarded 10 years Regorous Imprisonment but in view of the aforesaid facts and keeping in mind the fact that the appellant is in judicial custody since 3/5/1998, we are of the opinion that the sentence which the appellant has already undergone can be treated as sufficient punishment, so as to meet the ends of justice.

6. In the result, the appeal is partly allowed. The sentence already undergone by the appellant-accused is ordered to be treated as sufficient punishment. The sentence imposed by the learned Sessions Judge, Surenranagar in Sessions Case No.85 of 1998 vide judgement and order dtd.28/1/1999 is reduced to the period already undergone by the appellant accused. The appellant accused is ordered to be set at liberty forthwith, if not required in any other case.

(R.P.DHOLAKIA,J.)

rafik (SHARAD D.DAVE,J.)